Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1141

UNITED STATES OF AMERICA,

Petitioner,

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS; AND QUESTION PRESENTED

The Government's brief accurately refers to (1) the reported and unreported decisions below, (2) the jurisdictional basis for this Court's review, (3) the relevant constitutional provisions, statutes and regulations involved, and (4) the question presented.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

On March 6, 1974, according to the testimony of a number of government witnesses, the Bank of Loganville, Georgia, was robbed by two armed robbers who entered the bank about 10:30 A.M. wearing ski masks. (T. 28, 39, 45, 50 and 55). In addition to the two armed robbers that entered the bank, there was a third masked person outside the bank who was driving what was reported to be a getaway car for the robbers. (T. 71, 84). During the course of the robbery, one robber held a number of employees at bay in the lobby of the bank with a pistol and the other robber vaulted the teller cage and emptied the cash drawers, taking an estimated $7,501.73. (T. 105).

When the two robbers entered the bank, they were yelling and giving orders (T. 55) and the robber who vaulted the teller cage ordered the tellers to lay down against the wall while he emptied the cash drawers (T. 40, 43). Ms. Brooks, a teller at the bank, testified that this robber spoke in a deep voice and otherwise characterized the voice of the robber as "gravely." (T. 40, 43).

On departing the bank the robbers encountered Officer Cody of the Loganville police and exchanged gunfire with the officer. (T. 69). An eyewitness to the robbery, Robert Alton Webb, testified that the driver of the car had long brown hair and it might have been a woman. (T. 92). A number of marked bills described as bait money were taken from the bank by the robbers. (T. 107).

Billy Wayne Davis, Billy Sunday Birt and Bobby Gene Gaddis were charged with having committed the

robbery. Billy Wayne Davis pled guilty to the charges and appeared at the trial of Birt and Gaddis as a witness for the government. (T. 157-204).

At the trial of Birt and Gaddis, F.B.I. Agent Kane testified that after receiving a report from Toccoa, Georgia, that Mrs. Mary Davis, the wife of Billy Wayne Davis, had deposited some of the bait money from the robbery in a Toccoa bank (T. 115) he visited the Davis home whereupon he discovered additional bait money in the Davis' freezer. (T. 135). Mrs. Mary Davis testified that she received the money from her husband, Billy Wayne Davis. (T. 145).

In the prosecution of its case, the government presented some twenty-two witnesses and of these witnesses only one, co-defendant Billy Wayne Davis, was able to identify either Birt or Gaddis as being present at the Bank of Loganville the day it was robbed. There was no independent testimony to otherwise connect Birt or Gaddis with the robbery. Furthermore, at the trial, a number of lay witnesses testified that Birt and Gaddis were in Winder, Georgia, on the day and at the time the Bank of Loganville, Georgia, was robbed. (T. 205, 211, 231, 251). And, there was testimony by Mrs. Betty Maddox, Birt's third grade teacher, that Birt's speech impediment that was so evident during the trial was as serious at the time of the trial as it had been when she taught him in the third grade. (T. 229). Birt stuttered or otherwise slurred his speech to the point that at times he could not be understood. According to the government's scenario Birt was the robber who vaulted the teller cage and ordered the women to lie down and shouted other instructions to the employees of the bank. However, not one of the

employees detected anything strange or unusual about the speech of this robber other than it was a deep gravely voice. (T. 40, 43).

ARGUMENT

I.

THE *MILANOVICH* DECISION IS A LOGICAL APPROACH TO THE ERROR COMPLAINED OF IN THIS CASE AND SHOULD NOT BE OVERRULED.

This Honorable Court in *Milanovich v. United States*, 365 U.S. 551 held that an accused cannot be convicted of theft and of receiving or possessing the stolen property. In reaching this conclusion this Court relied primarily on an earlier decision, *Heflin v. United States*, 358 U.S. 415. A consideration of *Heflin* is part and partial of an analysis of *Milanovich*.

The defendant in *Heflin*, like the respondents in this case, was indicted and convicted of bank robbery, 18 U.S.C. § 2113(a) and of receiving the stolen money, 18 U.S.C. § 2113(c). On a motion for correction of sentence under 28 U.S.C. § 2255 this Court held that taking and receiving are two completely separate and independent crimes which can be committed only by separate persons. The defendant had been given consecutive sentences and on review the only question before the Court was whether the sentence was invalid on its face. Given the foregoing reasoning the response was affirmative. The case was not remanded for a new

trial because it was an out of time appeal and the scope of the review was limited.

The decision in *Heflin* was based in part on a consideration of the legislative history of § 2113(c).[1]

The lower appellate courts of this country have followed the *Heflin-Milanovich* doctrine for over fifteen

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[1] "Subsection (c) § 2113, with which we are now primarily concerned, came into the law in 1940. The legislative history is meagre. The Senate Report (S. Rep. No. 1801, 76th Cong. 3d Sess.) is captioned 'Punishment for Receivers of Loot from Bank Robbers.' The Report states, 'This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute,' p. 1. Similarly the House Report states 'Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission.' HR Rep No. 1668, 76th Cong., 3d Sess., p.1.

This clue to the purpose of Congress argues strongly against the position of the Government. From these Reports it seems clear that subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense. But in view of the legislative history of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Heflin, supra*. 419.

A recent decision by this Court clearly demonstrates the importance of legislative history in interpreting a law and determining its appropriate application. *See Iannelli v. United States*, ____ U.S. ____, 43 L.Ed. 2d 616, 628-630, 95 S. Ct. 1284.

years.[2] Moreover, the principle of law that undergirds the reasoning that the principal in a theft, or the person who actually steals the property, cannot be convicted of the crime of receiving or possessing the property stolen has found support in American and English jurisprudence for over 200 years. *See* 136 A.L.R. 1087 and citations at 1088-1090.

Illustrative of the cases in point is the case of *Regina v. Evans*, 7 Cox. C.C. 151, a Queen's Bench decision in

[2]The following are a number of cases that have considered the *Heflin-Milanovich* doctrine.

THIRD CIRCUIT: United States v. Roach, 321 F.2d 1 (C.A. 3); *United States v. Welty*, 426 F.2d 615 (C.A. 3) (recognizing rule).

FOURTH CIRCUIT: United States v. Harris, 346 F.2d 182 (C.A. 4); *United States v. Lawrenson*, 196 F. Supp. 838 (DC Md) (recognizing rule), affd. 298 F.2d 880, (C.A. 4); cert. den. 370 U.S. 947;

FIFTH CIRCUIT: Baker v. United States, 357 F.2d 11 (C.A. 5) (recognizing rule); *Thomas v. United States*, 418 F.2d 567 (C.A. 5); *Grant v. United States*, 424 F.2d 273 (C.A. 5) (recognizing rule), overruled on other grounds; *United States v. Woodall*, 438 F.2d 1317 (C.A. 5) cert. den. 403 U.S. 933; *United States v. White*, 440 F.2d 978 (C.A. 5) (recognizing rule); *Rose v. United States*, 448 F.2d 389 (C.A. 5);

SIXTH CIRCUIT: Matlock v. United States, 309 F. Supp. 398 (DC Tenn) (recognizing rule).

SEVENTH CIRCUIT: United States v. Parker, 181 F. Supp. 73 (DC Ind) (recognizing rule), affd 283 F.2d 862 (C.A. 7), cert. den. 366 U.S. 937.

EIGHT CIRCUIT: United States v. Jones, 418 F.2d 818 (C.A. 8) (recognizing rule).

NINTH CIRCUIT: Clermont v. United States, 432 F.2d 1215, (C.A. 9), cert. den. 402 U.S. 997, *but see United States v. Tyler*, 466 F.2d 920 (C.A. 9);

TENTH CIRCUIT: Glass v. United States, 351 F.2d 678 (C.A. 10) (recognizing rule); *Jenkins v. United States*, 361 F.2d 615 (C.A. 10).

the era 1783-1796.[3] As noted in the dissenting opinion in *Dunn v. United States*, 284 U.S. 390, 401, the defendant in *Regina v. Evans, supra* was accused of stealing sheep and receiving them the same day in a two count complaint. He was found guilty on both counts.

> This record must therefore be dealt with as if there had been a special verdict, on which the court should find matter which would not justify either an acquittal or conviction. The practice in such a case has been to award a *venire de novo*. The cases in Lord Raymond's reports, and the later cases, sanction such a course, and we cannot see any good grounds for distinguishing an uncertain general verdict, such as this, from an uncertain special verdict. *Dunn v. United States, supra* at 490.

Given the above premise it is the duty of the trial court to insure that an accused is not convicted of both robbery and possession of the same property. The only way to protect an accused from this result were the government chooses to indict for both offenses is for the trial judge to instruct the jury that they can convict the accused of either robbery or receiving but not both. This either/or instruction is especially prudent where on trial, as in the present set of circumstances, it develops that one of the accused participants merely drove the robbers to the scene as in *Milanovich*.

Further, in our view, it is of no import that respondents were also charged with aiding and abetting

[3]The full text of *Regina v. Evans* is reported in either Vol. 29 or Vol. 30 of English Reports, however, the writer was unable to obtain a copy of the full text after a survey of local law libraries. Therefore, the case is offered as analysed by the Court in *Dunn v. United States, supra.*

under 18 U.S.C. § 2. Attempts to distinguish similar cases and thereby take them out of the purview of *Milanovich* have been rejected by the lower appellate courts. *See Baker v. United States*, 357 F.2d 11 (C.A. 5) and *Glass v. United States*, 351 F.2d 678 (C.A. 10).

In *Baker, supra*, the defendant personally transported the actual robbers to the scene and shortly afterwards met the actual robbers at a previously designated place. The reviewing court reversed the defendant's conviction both for aiding and abetting in the commission of the robbery and receiving stolen money on the grounds that the defendant as a principal in the robbery under 18 U.S.C. § 2, could not be convicted of receiving the proceeds of the robbery. Further, he could not be prosecuted for both offenses in the absence of an instruction to the jury that the defendant could be convicted of either but not both. The reviewing court in *Glass, supra* reached the same conclusion under a similar set of circumstances. While these are circuit court opinions the rationale of each is sound and should be applied to this case.[4]

A. The *Milanovich* decision requires a new trial on the facts of this case.

The issue before this Court is not one of fact but of law and concerns the absence of a proper charge by the trial judge given the indictment, charge and verdict in this case which resulted in respondents being convicted

[4]*See* 12 A.L.R. Fed. 664, 685 for an analysis of *Baker, supra* and *Glass, supra* as applied here.

of robbery in violation of 18 U.S.C. 2113(a), and (d) and possession of the money stolen from the bank in violation of 18 U.S.C. 2113(c). Any verbage seeking to distinguish the *Milanovich* decision from the case at bar on the facts is superfluous in the respondents' view. As Judge Duniway noted in his concurring and dissenting opinion in *United States v. Tyler*, 466 F.2d 920, 926 (C.A. 9);

> case does not decide only the exact factual question that it presents; it decides that question on the basis of a reason - a *ratio decidendi* - and it is authority in every other case in which that *ratio decidendi* is applicable.

Assuming arguendo that a comparison of the factual make-up of *Milanovich, supra*, and the present set of circumstances is appropriate, petitioner's attempt to distinguish the cases fails. (Pet. Brief, pp. 18-25).

In *Milanovich, supra*, Mrs. Milanovich drove the participants of the theft of a United States Naval Commissary to the scene of the crime. However, she departed before the thieves returned from the building. She later came into possession of the fruits of the crime on a return trip to the scene. *Milanovich, supra*, at 557. In the set of circumstances now under consideration, at least as to one of the respondents, the participation was much the same. One man drove the getaway car to the scene and waited while the two robbers held up the bank and then drove them away. It is a distinction without a difference that on the one hand Mrs. Milanovich drove away early, and here the driver waited for the robbers. Moreover, the time span between the taking and the possession is of little importance.

It is conceded that this argument can only be made on behalf of the driver of the vehicle who was

identified as Gaddis by the government's chief witness, co-confederate Billy Wayne Davis. However, given the testimony concerning Birt's speech impediment and the extent of the language purportedly used inside the bank by Davis' partner, the jury might have concluded that Birt did not enter the bank but was the driver of the car. Suffice it to say, there is not such a distinction in the factual pattern involved in the *Milanovich* decision and in the case at bar to render the *Milanovich* rule inappropriate.

Certainly, if the government in preparation of its indictment did not harbor the thought that a properly instructed jury might find the driver of the getaway car not guilty of robbery, then it would not have included the possession count in the indictment. And, contrary to petitioner's position, it would have been logically possible for the jury to acquit at least one of the respondents of robbery and to convict him of possession.

Accepting that the precepts enunciated in *Milanovich, supra*, are sound principles of law, then as applied to these respondents a new trial is demanded.

> There is no way of knowing what verdict a properly instructed jury would have returned in this case, and for a reviewing court to speculate on that subject would be to usurp the functions of both the jury and the sentencing judge. *Milanovich v. U.S.*, 1961, 365 U.S. 551, 81 S. Ct. 728, 5 L.Ed. 2d 773. Since the jury's verdict was inherently inconsistent, the proper appellate remedy is to remand for a new trial. *U.S. v. Gaddis*, 506 F.2d 352, 354 (C.A. 5).

B. The new trial should be a complete rehearing and not one limited to which crime respondents committed.

On brief petitioner suggests that if this Court concludes that a new trial is required then the function of the new trial should be to determine whether the respondents are guilty of possession or robbery. In support of this theory petitioner attempts to analogize the present case with this Court's ruling in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494; (Pet. Brief, p. 50).

In *Gasoline Products, supra*, it was determined that a new trial may be granted in a civil case on the issue of damages thus denying a rehearing on liability where reversible error is limited to the question of damages. This bifurcated approach is realistic in a civil setting for the jury must clear the threshold issue of liability before considering the damages question. If the liability issue is resolved in favor of the defendant there is no further deliberation. Criminal cases do not lend themselves to this type of analysis. Juries are not instructed to determine first, whether the defendant is guilty and, if so, then of what.

There is no merit in petitioner's argument that the *Gasoline Products* rationale is applicable in this case as a cure for the error committed by the trial court. A new trial on all the issues is the proper means for correcting the absence of the required either/or instruction below.

C. The Common Law Rule of Priority is not applicable in this case.

This Court should not adopt a rule of priority in this case and merely remand the matter to the trial court for vacation of the possession conviction. This approach would leave the twenty-five year sentence for violation of § 2113(d) intact. It is interesting to note that the government made a similar argument before the United States Court of Appeals for the Fifth Circuit, only there the suggested remedy was vacation of the robbery conviction thereby leaving the ten-year sentence for possession in effect. (Appellee's brief pp. 14-15 *United States v. Gaddis, supra*).

If possession was a lesser included offense of robbery under the statute in question, this remedy might have some validity. However, the error complained of here is not one of conviction of a primary offense and a lesser included offense, but rather the error here is that the respondents have been convicted of two offenses which are mutually exclusive. There is a merger of the § 2113 (a), (b), (d) and (e) on conviction as in the situation where there is a conviction of a primary offense and a lesser included offense. *United States v. Anderson*, 448 F.2d 1379 (C.A. 3). There is no merger of § 2113(c) and therefore the rule of priorities where multiple convictions occur is inappropriate here.

II.

IF MILANOVICH MUST BE OVERRULED, THE DECISION SHOULD BE APPLIED PROSPECTIVELY AND THESE RESPONDENTS SHOULD NOT BE DENIED A NEW TRIAL.

Should this Court decide that the *Milanovich* decision must be overruled, then the decision should be applied prospectively only. Respondents concede that there is a little precedent for such an application. However, as to civil matters, this Court has upheld the power of a state court to do so in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358. In the *Sunburst* case the Montana Supreme Court had ruled, in 1921, that if railroad freight charges paid by a shipper are later found to be excessive by the State Railroad Commission, the shipper could sue to recover the excess. Some years later, *Sunburst*, a shipper, sued a railroad in such a situation. The Montana Supreme Court then announced that its 1921 ruling was erroneous and would not be followed in the future but that the plaintiff-shipper in the case before it would be permitted to recover because it had relied on the 1921 holding.

The rationale of the *Sunburst* ruling is appropriate in this case. Clearly, in the past, cases originating from similar factual backgrounds in the district courts of the Fifth Circuit have resulted in the defendants being granted new trials. *United States v. Abercrombie*, 480 F.2d 961 (C.A. 5) cert. den., 414 U.S. 1008; *United States v. White*, 440 F.2d 978 (C.A. 5). Respondents respectfully urge this Court to allow them a new trial even if the *Milanovich* decision is overruled.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded to the district court for a new trial.

Respectfully submitted,

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